


COMMONWEALTH OF VIRGINIA
Department of Environmental Quality

Subject: Division of Enforcement Case Referrals

To: Deputy Regional Directors, Regional Enforcement Managers and Specialists (electronic distribution)

From: Melanie D. Davenport, Director
Division of Enforcement 

Date: August 20, 2009

Copies: Rick Weeks, James Golden, Cindy Berndt, Regional Directors, Central Office Enforcement Managers (electronic distribution)

Summary and Purpose

The new procedure¹ for referring an enforcement matter to Enforcement for an administrative proceeding has been signed and is now in effect. The procedure is as presented at the June 4, 2009 enforcement meeting, with the addition of a comments section on the Case Referral Form. This procedure was developed in response to questions from regional staff and should smooth the process for case referrals as well as expedite handling of cases.

The procedure will be posted on DEQnet under Enforcement, Agency Guidance and the Virginia Regulatory Town Hall at www.townhall.state.va.us.

Contact Information

Questions regarding this guidance or its application should be directed to Julie Shelton (Ext. 4251) or Melanie Davenport (Ext. 4038).

¹ Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. See Va. Code § 2.2-4001. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations and policies of the Commonwealth to case-specific facts.




Division of Enforcement

Memorandum

SUBJECT: Division of Enforcement Case Referrals

TO: Deputy Regional Directors, Regional Enforcement Managers and Specialists (electronic distribution)

FROM: Melanie D. Davenport, Director
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This internal operating procedure explains the process to be followed when a regional office would like to refer an enforcement matter for an administrative proceeding. As administrative actions often require significant time and expense to prepare and present, before committing to such an action staff must have concurrence from the Regional Director or Deputy Regional Director and the Director of Enforcement.

Overview

Most enforcement cases are resolved by regional staff through consent actions; however, in some cases an adversarial administrative proceeding such as an informal fact finding proceeding¹ or a formal hearing² may be needed to reach resolution. An adversarial action may be appropriate when:

- The violation has significant environmental or regulatory impacts;
- Establishing the violation has significant precedential value;
- The Department seeks to suspend or revoke a permit, right or license as part of the enforcement case;

¹ See Va. Code § 2.2-4019. In addition, Va. Code § 10.1-1186 authorizes the Director to issue “special orders” following an informal fact finding proceeding. An 1186 Special Order is “an administrative order issued to any party that has a stated duration of not more than twelve months and that may impose a civil penalty of no more than \$10,000.” See Va. Code § 10.1-1182.

² See Va. Code § 2.2-4020.

- Regional staff have been unable to negotiate an agreement with the party within a reasonable period of time;
- The party has been non-responsive to NOV's or a proposed consent order and follow-up efforts to contact the party have been unsuccessful.³

Steps for Referring a Case to DE

In most cases, the regional enforcement specialist and media manager (Air, Water, Waste, Wetlands or Petroleum) will have discussed the case during consent negotiations. Regional staff and Enforcement may also try other approaches, such as a call or letter from the Regional Director or Enforcement, or a meeting or site visit with the party, regional staff and Enforcement. If an adversarial action is contemplated, the Adjudication Manager must be consulted. Before referring a case for an administrative action, regional staff should review the case file to ensure it contains all necessary information for a referral. The case file should:

- Identify and document all outstanding violations, including factual support for the violations and the statutory and regulatory basis for the violations;
- Contain a recent inspection report [within six (6) months or less, depending on the issues];
- Document all contacts and negotiations with the facility, including whether a draft consent order has been sent to the facility (*See* Footnote 3);
- Contain complete and current information about the facility's corporate status; and
- Contain an Enforcement Recommendation & Plan (ERP) and draft consent order, if applicable, that identifies the relief sought by the region and how the relief relates to the violations.

The enforcement specialist should submit a DE Case Referral Form (Form) (attached) to request an administrative proceeding. Enforcement will determine whether an administrative proceeding is warranted. Enforcement may not accept every case that it is asked to evaluate. For a case to be accepted, the file must contain all relevant documentation⁴, as addressed above. Certain statutory requirements must be met before a formal hearing can be held. Accordingly, when communicating with a party regional staff should not state that an administrative proceeding will be scheduled if the party does not sign a consent order; rather, staff may advise the party that the RO will consider referring the matter to Enforcement for evaluation.

³ If a proposed consent order has not been presented to the Responsible Party, the RO should contact the Adjudication Manager to discuss whether a proposed consent order should be sent prior to initiating an administrative proceeding.

⁴ Staff should maintain a signed copy of all correspondence and have a tracking system for Domestic Return Receipts

Evaluation

In evaluating a request for an administrative proceeding, Enforcement will engage in both informal discussions and review of documentation. To effectively evaluate the request, the Adjudication Manager must have access to all relevant documents, including but not limited to notices of alleged violation, the ERP and proposed consent orders. The Adjudication Manager may request additional documentation to evaluate the case.

Once all of the requested information is received, the Adjudication Manager will review the documentation and discuss the case with the Director of Enforcement, who may request further information and/or discuss the case with regional enforcement staff or the Regional Director. If Enforcement determines that an administrative action is appropriate, Enforcement and regional staff will discuss the type of proceeding to be scheduled. Enforcement will complete the Form and return the original to the regional office to be placed in the file. Enforcement will complete its review within thirty (30) days of the date all requested information is received.

The Director of Enforcement and the Regional Director may agree to other processes and procedures as the case may dictate.

Agency Operating Report (AOR)

The date of the Director of Enforcement's signature on the Form is the date to be used for reporting referrals for the AOR.

Administrative Action Approved

The Adjudication Manager will take the lead in preparing the notice, making arrangements for the proceeding or hearing, preparing exhibits, presenting the agency's case, and preparing post-proceeding or post-hearing submissions. These efforts are taken in consultation with and support of the regional office, since the enforcement action remains fundamentally a regional enforcement case. The regional office is responsible for providing the Adjudication Manager with all information relevant to the case. Full and open communication is necessary.

The regional office should enter any relevant information into CEDS or other reporting system. The regional office is responsible for responding to any Freedom of Information Act (FOIA) requests, in consultation with the Adjudication Manager.

Administrative Action Not Approved

If Enforcement determines that an administrative action is not warranted, Enforcement will discuss its decision with regional staff and include comments on the Form. Enforcement and regional staff may discuss other strategies to resolve the enforcement matter. If regional staff decide not to further pursue the matter, a dereferral should be written for the file.

As noted above, the regional office should enter any relevant information into CEDS or other reporting system and is responsible for responding to any FOIA requests.

Case Decision

Once the decisionmaker⁵ has rendered a case decision, the decision is sent to the party, regional staff, the Adjudication Manager and the Office of Financial Management (if appropriate). The regional office is responsible for monitoring and tracking any Order for compliance and for terminating the Order when its terms have been satisfied.

Appeal

If there is an appeal, Enforcement will lead the preparation of the agency record. Once the time for an appeal has expired or a final decision on the appeal rendered, Enforcement will return any original documents to the regional office with a memorandum indicating that the case is complete.

Questions

Please direct any questions to Julie Shelton at ext. 4251 or Melanie Davenport at ext. 4038.

Attachment

⁵ Usually, the decisionmaker will be the Director of DEQ.

Division of Enforcement Case Referral Form

The _____ Regional Office requests an administrative action in the
matter of _____.

[State reason(s) for requesting the action.]

Regional Office:

Regional Director/DRD _____ (Date)

Enforcement Manager _____ (Date)

Enforcement Representative _____ (Date)

Division of Enforcement:

This matter is ☐ recommended / ☐ not recommended for an
[informal fact finding proceeding/formal hearing].

Adjudication Manager _____ (Date)

☐ Agreed:

Director of Enforcement _____ (Date)

Comments: